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MEMORANDUM

February 5, 2021

To: TRIBAL HOUSING CLIENTS

From: Ed Clay Goodman and Cari Baermann
HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *NAIHC Legislative Committee Meeting – February 4, 2021; COVID Relief Update*

On February 4, 2021, the National American Indian Housing Council (NAIHC) convened a Legislative Committee Call via Zoom. The meeting was presided over by NAIHC Executive Director Tony Walters. The next legislative Committee Call will be held on March 4, 2021. The updates below are a synthesis of information provided during the call and other updates we have received regarding COVID-19 relief.

I. Congressional Updates

a. New Congress

The new 117th Congress began this January. There were runoff elections in January 2021 for two positions in Georgia. Both of these positions were won by Democrats so the U.S. Senate is now split 50-50 between Democrats and Republicans. With Vice President Kamala Harris holding the tie vote, Democrats effectively have control of both the Senate and the House. Congress is continuing to finalize various legislative committees, as many members from the previous 116th Congress have retired. Senators Brian Schatz (D-HI) and Lisa Murkowski (R-AK) continue to serve on the Committee on Indian Affairs, while Senator Tom Udall (D-NM) has retired.

b. Coronavirus Relief.

Congress has begun discussing the next COVID-19 relief bill. Democrats have discussed providing \$1.9 trillion in relief and are trying to get bipartisan support for the idea. However, because the Democrats have a simple majority in both congressional chambers, there is also some talk about moving the next COVID-19 relief bill through without Republican support. (Early Friday morning, February 5, 2021, the Senate approved, on a 50-51 vote, with Vice-President Harris breaking the tie, the procedural mechanism that will allow this legislation to move through Congress in a process called “reconciliation,” which avoids the Senate filibuster and would allow the legislation to be passed on a straight party-line vote.) One main focus is whether to provide further support for state, local, and tribal governments. If the Democrats finalize and pass the \$1.9 trillion bill, NAIHC expects that the bill will provide further funding for Tribes. There has also been some discussion of adding more funds to the Emergency Rental Assistance Program. NAIHC is working with Congress to see if it is possible to add more

funding to that program or to add the funds to other existing Native American Housing Assistance and Self-Determination Act (NAHASDA) programs. Additionally, there has been talk of creating new COVID-19 relief homeownership programs for mortgage and utility assistance for homeowners. If such a homeownership program is created, Mr. Walters noted that he expects it would probably include a 3-5% tribal set aside. That funding would be for the specific use of mortgage and utility assistance. As with the current version of the Emergency Rental Assistance Program, funds not used for the specified purpose or within the specified time period would be recaptured. Mr. Walters then opened the call up for comments or questions from callers regarding their conversations with their congressional representatives.

One caller commented that the United Native American Housing Association (UNAHA) has been tracking some of the various efforts to increase funding for tribal housing, whether that be through a new COVID-19 relief bill, an infrastructure bill, or some other mechanism. UNAHA has put forth a proposal to reemphasize, for the new Congress, that Indian housing has a significant need for additional relief. The caller noted it is critical the regular Indian Housing Block Grant (IHBG) Program funding be increased to \$1 billion per year and the competitive IHBG program funding be significantly increased as well. Because of the pandemic, a greater number of people in Congress, and in the Administration, have realized the dangers of overcrowding, so the caller noted that would hopefully increase support for more funding for tribal housing.

Mr. Walters agreed and commented there must be a starting point for increased funding for tribal housing. He agreed that increasing competitive IHBG funding would be particularly useful. NAIHC had talked with President Biden's transition team, and now, the new White House team, about the annual appropriations budget and the necessity that the amount of funding provided to tribal housing be increased to keep up with inflation.

c. Indian Housing Legislation

Congress did not pass the NAHASDA reauthorization bills that had been introduced in both the House and Senate last session. Mr. Walters noted that he hopes that one, or both, of those bills move forward this year. There has been a lot of turnover in Congress this year, including the retirement of multiple House and Senate members who had sponsored the prior NAHASDA reauthorization bills. NAIHC is, therefore, still trying to identify lead housing sponsors for NAHASDA.

II. Grants and Administration

a. Emergency Rental Assistance Program

As you are aware, at the end of 2020, as part of the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260, Division N § 501, Dec. 27, 2020), Congress passed an updated COVID relief package that included \$25 billion for an Emergency Rental Assistance Program (ERA Program). Tribes received an \$800 million set-aside from this fund to provide rental and utility assistance. While the allocation of funding was determined by the annual IHBG formula operated by the U.S. Department of Housing and Urban Development (HUD), the ERA Program, itself, is overseen by the U.S. Treasury Department (Treasury). The deadline to apply for the

ERA Program funding was January 21, 2021, however Treasury decided to keep its application portal open for tribes to apply through January 26. Most tribes have received their allocations by now. Those tribes that did not meet the ERA Program application deadline may not have received their allocation yet. Treasury will also soon be recalculating any extra funding not yet allocated and will then reallocate that funding. Mr. Walters noted many tribes are already working on creating policies to carry out the ERA Program. However, there remains an open question about how to collect information for the program and what reporting is needed. The ERA Program statutory language provides Treasury some flexibility for determining what the reporting requirements will be for tribes. Consolidated Appropriations Act, 2021 § 501(g)(3). Treasury has indicated it seeks to make the ERA Program reporting process more consistent with other tribal housing reporting, given the limited tribal capacities during the pandemic. Treasury is therefore requesting Tribes provide feedback as to what types of information Treasury should request from Tribes as reporting requirements.

Mr. Walters then opened up the call for questions and comments from participants.

- Will Treasury lower the requirement that Tribes expend 65% of the ERA Program funds by September 30? The caller noted expending that much by September 30 would be difficult for many small Tribes that have limited capacity during the pandemic. He asked whether there was any way to obtain flexibility in the ERA Program or obtain a waiver for disadvantaged communities or especially improvised areas.
 - Mr. Walters responded that Treasury is constrained by the very specific statutory language, which sets the September 30 date and requires the recapture of funds if the 65% expenditure target is not met. Any such change or flexibility would have to come from Congress. Mr. Walters noted he has not yet heard anything to indicate Congress is talking about changing the ERA Program to provide flexibility or a waiver. However, he will raise this concern with Congress and advocate that it be changed.
 - Mr. Walters also commented there continue to be concerns over the requirement that tribes use the area median income (AMI) calculation for income eligibility for the ERA Program (as opposed to being permitted to use the National Median Income as an alternative). Many Tribes have raised concerns with the use of the AMI, as for many impoverished areas, the low local AMI would be significantly lower than the National Median Income. Mr. Walters will be raising this issue with Treasury to determine whether there will be flexibility to allow use of the National Median Income. However, the statutory language provides that ERA Program assistance can only be provided to individuals or families with an annual income at or below 80% of the area median income, and defines the AMI as “the median income for the area in which the household is located.” § 501(k)(1) (emphasis added).
- Another participant asked whether there have been any discussions about flexibility within the Treasury ERA Program regarding expanding the eligible uses of ERA Program funds, such as for rehabilitation of rental units? Mr. Walters responded that there will not

likely be any flexibility to allow ERA Program funds to be used for rehabilitation, especially as the bulk of the ERA Program funds are to be spent on rental assistance itself. However, he noted that a tribe acting as a landlord is eligible for ERA Program funds as long as they are not over-prioritizing their own rental collection over other landlords.

- Will Treasury be putting out new guidance on the ERA Program funding? Mr. Walters noted Treasury will be releasing a new Frequently Asked Question (FAQ), which can be found at this link once it is made available [https://home.treasury.gov/policy-issues/cares/emergency-rental-assistance-program?utm_source=NLIHC+All+Subscribers&utm_campaign=6fd2135399-policy_WG_agenda_2-2-2021&utm_medium=email&utm_term=0_e090383b5e-6fd2135399-293302966&ct=t\(Policy_WG_agenda_2-2-2021\)](https://home.treasury.gov/policy-issues/cares/emergency-rental-assistance-program?utm_source=NLIHC+All+Subscribers&utm_campaign=6fd2135399-policy_WG_agenda_2-2-2021&utm_medium=email&utm_term=0_e090383b5e-6fd2135399-293302966&ct=t(Policy_WG_agenda_2-2-2021)). This link also has the old FAQ. He also recommended that anyone with specific comments should email those directly to Treasury. The Treasury staff have been responsive to emails in the last few weeks, but they have not shared a timeline for releasing the new FAQ. The Treasury ERA Program website states they will be posted “very shortly,” but that notice has been up for over a week now.
- Another caller commented everyone is waiting for the revised Treasury guidance on the ERA Program funds. He noted the ERA Program provides funding to non-tribal housing entities, as well as tribal entities, and that many tribal and non-tribal housing entities have questions about who is eligible for assistance and about how to process applications. He stated most people are discouraging housing entities from sending out any money until Treasury releases new guidance. Mr. Walters responded by commenting that Tribes will not likely lose out on funding or on opportunities to pay renters’ payments in arrears if the Tribes wait to make any payments for a month until Treasury releases new guidance. He indicated that it instead may be beneficial for Tribes to wait, given the uncertainty about who is eligible and what types of payments in arrears are eligible for assistance. However, given the short timelines for spending the funds, delays could be problematic, and a number of tribes are putting the program into operation now, and will revise their procedures as needed going forward.
- Another participant asked whether Treasury will allow ERA Program funds to be used for homeownership opportunities to relieve existing overcrowding issues in the reservation? Mr. Walters responded that Treasury will not entertain any use of the ERA Program funds for homeowners right now because Congress specifically left homeownership assistance out of the statute. NAIHC is still working with Treasury on whether Treasury will limit utility assistance to renters, or whether it will allow housing entities to provide utility assistance to homeowners. Additionally, there is a catchall provision in the statute that allows ERA Program funds to be used for other housing expenses. Mr. Walters is hoping Treasury will consider other housing needs such as internet and child care to all under this catchall provision.

- Finally, another participant asked whether there has been discussion about access to the Emergency Solutions Grant? The HUD Emergency Solutions Grant Program addresses the needs of homeless individuals in emergency or transitional shelters by providing assistance to allow them to regain stability in permanent housing. Mr. Walters responded he has not yet talked about that access with anyone this year, but he will take another look at access to that grant. He also noted the homeownership assistance program from last year was directed to go through the Emergency Solutions Grant, which included a tribal set aside. He has not yet seen language that would address a budget reconciliation for that program.

b. Housing Counseling Consultation

HUD has been conducting tribal consultation sessions to obtain feedback on implementation of a housing counseling regulatory amendment to the Housing and Urban Development Act of 1968 as it applies to the IHBG and the Indian Community Development Block Grant (ICDBG) programs. On December 14, 2016, HUD published a final rule addressing certification requirements for housing counseling. The rule implements the amendment by requiring that within 36 months of the availability of a certification examination, housing counseling (as required by or provided in connection with HUD programs) could only be provided by HUD-certified housing counselors working for a participating agency. The rule will only apply to the IHBG and the ICDBG programs after completion of tribal consultation and rulemaking. In future rulemaking, informed by this tribal consultation and other public comment, HUD will codify how the certification requirements are applicable to the IHBG and ICDBG programs, and eligibility requirements for Tribes to participate in the HUD Housing Counseling Program.

Application of the certification requirement to IHBG and ICDBG programs could create a problem for Tribes and the housing counseling services they offer. NAIHC is working with HUD to make sure an exception applies to Tribes. Prior discussions with HUD have indicated that Tribes are currently not eligible to be certified for providing housing counseling. The final rule and tribal consultations are being implemented through the HUD Office of Housing Counseling. That office does not have much experience or knowledge about tribal housing, so NAIHC is working with that office to help educate them about tribal housing. The written comments for the final rule are due in March.

c. BIA LTRO Rulemaking

In December, 2020, the Bureau of Indian Affairs (BIA) proposed a rule to modernize the current regulations governing the Land Title and Records Office (LTRO). The LTRO maintains title documents for land held in trust or restricted status for individual Indians and tribes. This proposed rule would replace outdated provisions, restructure the framework for future LTRO operations, and streamline the LTRO recordkeeping process. The comments for the proposal are due next week. As this is only the proposal stage, BIA will have another comment period before its final rulemaking. The new proposal does not improve the process for Tribes much. Mr. Walters commented more improvements are needed, such as providing greater flexibility regarding who can access the documents.

One participant asked whether there are any updates on when BIA will open up again to work on conveyances. Mr. Walters responded that BIA has not provided any information on that question at this point.

d. GAO report on Veterans Affairs: NADL

The Government Accountability Office (GAO) is looking for Tribes involved in the Native American Direct Loan (NADL) program to talk to the GOA about the program. The NADL Program provides Native American veterans living on trust land with an accessible home loan option. Tribes must have an agreement with the NADL program to participate in it. However, the number of staff to promote that program is limited on both the federal and local community side. Mr. Walters encouraged participants on the call to let him know if the Tribe would like to participate in the NADL program.

e. Tribal HUD-VASH NOFA

HUD has published a Notice of Funding Availability (NOFA) that expands the Tribal HUD-VASH program. The NOFA announces the availability of approximately \$3.2 million for competitive grants to eligible Indian Tribes and Tribally Designated Housing Entities (TDHEs.) Applicants have until 11:59:59 p.m. Eastern Daylight Time on April 15, 2021, to submit applications via www.grants.gov. For further information about this funding opportunity, please visit Grants.gov (www.grants.gov) and Codetalk (www.hud.gov/codetalk).

III. Other Matters

The next NAIHC Legislative Committee meeting will be held March 4, 2021. The NAIHC Legislative Committee meetings will continue to be held the first Thursday of each month. Anyone who would like to submit questions prior to the call may do so through the link provided in the NAIHC email sent out prior to the call. That will allow NAIHC to address additional questions during call. NAIHC will continue to host the calls via a Zoom platform.

Conclusion

If you have any questions about this memo, please contact Ed Clay Goodman at 503-799-3924 or at egoodman@hobbsstrauss.com.